

therefore he could not maintain the action. The ground of the decision was that:

"If a stranger pays a part of a debt in discharge of the whole, the debt is gone because it would be a fraud on the stranger to proceed."

On the facts before me I was of the view that the contention of counsel for the defendant was well-founded.

It was for these reasons that I dismissed this action with costs.

Action dismissed.

Solicitors:—*R. Ramason; L. Rayner.*

LOO LAU CHAI & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Buttrose J.) November 25, 1963]

[Singapore — Magistrate's Appeal Nos. 97 & 98 of 1963]

Customs Ordinance 1960, s.113(1)(a) and (d)—Delivery of uncustomed goods—Views of locus in quo—Delivery from or in connection with ships—Whether conviction proper.

The appellants were convicted of being concerned in the delivery of uncustomed goods to wit dutiable cigarettes which were not under customs control under section 113(1)(a) of the Customs Ordinance and fined \$5,000 each in default 12 months imprisonment. The first appellant paid the fine but the second appellant did not and he had served more than half his sentence. On appeal it was argued for the appellants (a) that the learned District Judge was wrong in refusing an application made during the trial to view the *locus in quo* (b) that the learned District Judge erred in law in amending the charge to one under section 113(1)(a) of the Ordinance which applies only to delivery from or in connection with ships.

Held: (1) in this case no useful purpose would be served by viewing the *locus in quo* as photographs depicting the *locus in quo* were before the District Judge and the locality and physical features were described by the witness;

(2) section 113(1)(a) of the Ordinance relates to delivery from or in connection with ships and not to the facts of the present case. As there was the clearest possible evidence of an offence under the Ordinance a conviction under section 113(1)(d) substituted.

Case referred to:—

(1) *Stirland v. Director of Public Prosecutions* [1944] A.C. 315, 328.

MAGISTRATE'S APPEAL.

Peter Lee for the 1st appellant.

C. H. Koh for the 2nd appellant.

Francis Seow (Sr. Crown Counsel) for the respondent.

Cur. Adv. Vult.

Buttrose J.: The two appellants were convicted of being concerned in the delivery of un-

customed goods, namely, a large quantity of dutiable cigarettes which were not under customs control under section 113(1)(a) of the Customs Ordinance, 1960, (No. 44 of 1960) hereinafter referred to as 'the Ordinance'. They were each sentenced to pay a fine of \$5,000 in default 12 months imprisonment. The 1st appellant paid the fine but the 2nd appellant did not and has now served more than half his sentence. They now appeal.

There were only two grounds of any substance argued on the appeal:—

(1) That the learned District Judge was wrong in refusing the application made during the trial to view the *locus in quo* where, so it was said, the physical features were an important consideration in arriving at a decision on the material issues. With this ground was involved the general submission that on a proper appraisal of the prosecution evidence the police witnesses could not, at the time and in the circumstances, have seen what they allege they did; and

(2) That the learned District Judge erred in law in amending the charge to one under section 113(1)(a) of the Ordinance which applies only to delivery from or in connection with ships.

With regard to the first point the position was that the offence was committed at 5.30 a.m. on the 31st July, 1962, just inside the entrance of a small lane off Phillip Street. A witness was called by the 1st appellant for the purpose of giving evidence as to what he was able to see when he went to the scene of the crime some months later at the same time. An attempt, apparently, was made to reconstruct the crime to some extent by the witness placing his car in the lane at or about the same position as the suspect car. This scene however was not enacted till the 30th April 1963, some 9 months after the offence was alleged to have been committed.

The learned District Judge held that this evidence was inadmissible and in my view his decision was right. It was not a question of what a witness could or could not see at the scene of the crime 9 months later but what the police witnesses saw at half past five on the morning in question. It would in any event be impossible to ensure that precisely the same conditions prevailed on both occasions.

On the learned District Judge ruling that the evidence was inadmissible counsel for the 1st appellant applied for a view. This was refused by the learned District Judge and in my judgment he was right in so doing. It is difficult to see what useful purpose could be served by such a course. Photographs depicting the *locus in quo* were before him and the locality and physical features were described by the witnesses. If we viewed the scene at 5.30 in the morning some ten months after the incident the same objections would apply as in the case of the witness and might indeed have led to an erroneous conception of the situation.

It was for the witnesses at the time and in the circumstances on the morning in question to say what they saw and whether the learned District Judge accepted their evidence.

There was ample evidence if accepted by the learned District Judge to establish that an offence under the Customs Ordinance had been committed by the two appellants. It is true there were contradictions in the evidence of the police witnesses but these were all before the learned District Judge and counsel for the 2nd appellant in his address at the close of the prosecution case specifically drew his attention to this matter.

After a thorough examination of the record I am quite satisfied that it was possible for the prosecution witnesses to see what they said they did and in this connection it must not be overlooked that the main prosecution witness said he had a torch light and shone it and furthermore dawn was breaking.

So much for this aspect of the case.

With regard to the second point the learned District Judge at the close of the prosecution case on the 25th April 1963 amended the charge against the two appellants from one of possession of dutiable goods under section 113(1)(c) to that of being concerned in the delivery of uncustomed goods under section 113(1)(a). According to the record both counsel then representing the appellants in the Court below applied for an adjournment to look up the law on the amended charge which was granted.

A When the hearing was resumed a week later on the 3rd May 1963 both counsel stated that they did not wish to address the Court and no objection to the charge was taken and the defence was called on. It was only in the Petition of Appeal that this point was first taken.

B Without going into the propriety or otherwise of such a course I feel bound to point out that it is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal. See *Stirland v. Director of Public Prosecutions*.⁽¹⁾ The fact remains, however, that, C in my view, section 113(1)(a) of the Ordinance relates to delivery from or in connection with ships and not to the facts in the present case and the conviction in respect of this charge cannot be allowed to stand. In view however, of the circumstances and the fact that there was the clearest possible evidence of an offence against D the provisions of the Ordinance I propose to substitute a conviction under section 113(1)(d).

The appeal of each appellant is accordingly dismissed and the sentences are affirmed save and except that in the case of the 2nd appellant I consider his sentence of 12 months imprisonment E in default of payment of the fine excessive. As he has now served more than half his sentence I propose to direct his release with effect from today the 25th November, 1963.

Appeal dismissed.

F Solicitors: S. K. Lee; C. H. Koh & Co.